IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. DA 09-0578

HERMAN GONZALES, FAWN LYONS, KEN LAUDATO, LAWRENCE WALKER, GARY MANSIKKA, GARY GALETTI, GREG WHITING, MARVIN KRONE, RICHARD BLACK, JIM KELLY, CHRIS SOUSLEY, and All Others Similarly Situated,

Plaintiffs and Appellees,

vs.

MONTANA POWER COMPANY; NORTHWESTERN CORPORATION, a Delaware Corporation; NORTHWESTERN CORPORATION, a Delaware Corporation, as a Reorganized Debtor, Subsequent to Its Plan Confirmation, Hereinafter Referred to as NOR; NORTHWESTERN CORPORATION d/b/a NORTHWESTERN ENERGY; PUTNAM AND ASSOCIATES, INC., a Montana Corporation; JOHN DOES II AND III; and JOHN DOES IV THRU XX,

Defendants and Appellants.

DEFENDANT/APPELLANT MONTANA POWER COMPANY'S REPLY BRIEF

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STANDARD OF REVIEW

The Plaintiffs/Appellee's brief refers to *McDonald v. Washington,* 261 Mont. 392, 862 P.2d 1150 (1993), quoting *Doninger v. Pacific Northwest Bell, Inc.,* 564 F.2d 1304 (Wash. App. 1977):

> [T]he judgment of the trial court should be given the greatest respect and broadest discretion, particularly if. . . he has canvassed the factual aspects of the litigation. This is so because the district court is in the best position to consider the most fair and efficient procedure for conducting any given litigation. Such a determination by the court will not be disturbed on appeal unless the party challenging it can show an abuse of discretion.

McDonald, 261 Mont. at 399, 400, 862 P.2d at 1154.

The parties agree that abuse of discretion is the applicable standard of review. Here, the lower court's certification order reveals that it did, indeed, canvass *most* factual aspects of the litigation. That is why, on this appeal, MPC does not challenge the Court's principal determination that class treatment is generally appropriate. However, the lower court's order *does not mention* the issue of punitive damages, or how the issues of such a claim–subject as it is to a distinct standard of proof, a separate proceeding, and determined by constitutionally sensitive and unique standards–could fit in the representative format of a class action. This oversight is even more conspicuous when it is

recognized the court did acknowledge one predicate of a punitive damages award–fraud–was inappropriate as a class issue.

As briefly noted in MPC's opening brief, this Court considered "abuse of discretion" in a relevant context in *Sieglock v. Burlington Northern Santa Fe Ry. Co*, 319 Mont. 8, 81 P.3d 495 (2003). *Sieglock* was an appeal from an order *denying* class certification. This Court reversed the lower court because, from its review of the lower court's order denying certification, it did not appear that the court considered the alternative requirements of Rule 23(a)(2). *See,* Sieglock, 319 Mont. at 15, 81 P.3d at 499.

Here, it cannot be derived from the lower court's certification order that it reached the same conclusion the Plaintiffs/Appellees argue: that fraud as a predicate for punitive damages rests on individualized proof, but malice somehow does not.

ARGUMENT

Individualized Proof of Actual Malice is Required

On this appeal, MPC submits that, before the question of class certification of Plaintiffs/Appellee's punitive damages can be decided, close attention is owed to (1) what MPC is claimed to have done wrong, and (2) what, in particular, is claimed to constitute MPC's "malice."

In their answer brief, Plaintiffs/Appellees allege that "MPC had a pattern and practice of improper claims handling which it aimed[sic] and directed at a broad but specific class of individuals," that MPC treated injured workers "contrary to the *Holton* requirements," that MPC "concealed information about workers' compensation from its workers. . .failed to investigate maximum medical improvement and impairment ratings. . .failed to advise and educate the injured workers of their rights under the Workers' Compensation Act. . .[and] did not attempt to spread relevant information to the employees about workers' compensation." *See,* Plaintiffs/Appellee's Brief, p. 13.

Again, MCA § 27-1-221(2) defines actual malice:

> A defendant is guilty of actual malice if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the plaintiff and:
>
> (a) deliberately proceeds to act in conscious or intentional disregard of the high probability of injury to the plaintiff; or
>
> (b) deliberately proceeds to act with indifference to the high probability of injury to the plaintiff.

First, this definition describes an intentional or deliberate disregard of "*the plaintiff's*" vulnerability to injury. Secondly, it describes actions to accomplish deliberate harm to "*the plaintiff*," or conscious or intentional disregard of such

harm. To argue, as Plaintiffs/Appellees do, that the individualized circumstances of *each plaintiff* are not essential to a finding of malice is to disregard the textual definition of the term.

If MPC improperly handled claims, failed to comply with *Holton*, concealed information regarding impairment awards, failed to investigate whether such awards were owed, or failed to inform workers of the availability of such awards, it might be found to have violated one or more provisions of the Unfair Claim Settlement Practices Act, MCA § 33-18-201. Without proof establishing the intentional, deliberate or conscious disregard of a *particular* plaintiff's vulnerability to harm, however, there can be no malice.

The Plaintiffs/Appellees allege, in conclusory fashion:

> Despite knowing the high probability of injury, MPC deliberately proceeded to act in conscious and intentional disregard of this high probability of injury by withholding information, failing to investigate, failing to inquire about maximum medical improvement and/or impairment ratings, and other benefits, or MPC deliberately proceeded to act with indifference to this high probability of injury. *See,* Plaintiffs/Appellee;s Brief, p. 14.

These allegations do not rescue the Plaintiffs/Appellee's punitive claims from an individualized analysis. This is because attention is omitted from (1) the particular vulnerability of harm of the former claimant who may receive a "share"

of class punitive damages, and (2) how MPC intentionally, deliberately, or consciously disregarded that vulnerability.

MPC submits that without particularized proof of vulnerability–in the context of a statute that expressly refers to "the plaintiff"–there can be no malice. The "focus" is distinctly not, as Plaintiffs/Appellees argue, solely on MPC's alleged conduct, or whether that conduct impacted "a significant number of its injured employees."

Federal authority Cited in MPC's Opening Brief is Persuasive

The Plaintiffs/Appellees next assail the federal civil rights authority cited by MPC, *Nelson v. WalMart Stores, Inc.*, 245 F. R. Dec. 358 (E.D. Ark. 2007) and *Allison v. Citgo Petroleum Corp.,* 151 F.3d 402 (5th Cir. 1998), arguing that in those cases:

> The plain language of the statute requires an individual determination that the plaintiff was indeed "aggrieved," or a victim of the discriminatory practices. [citing: *Nelson*] Thus, similar to evaluating actual fraud under Montana Code Annotated § 27-1-221(3) and (4), the focus is both on the defendant's practices and on the plaintiff's circumstance to determine whether the plaintiff was actually a victim of the practices. [*Id.*] ("[R]ecovery of punitive damages in *Title 7* cases is a fact-specific inquiry requiring individualized and independent proof of injury to, and the means by which discrimination was inflicted upon, each member.")

Plaintiffs/Appellee's Brief, p. 15.

How is that different from this case? Plaintiffs/Appellees correctly note that in *Nelson*, the federal court had to determine whether each class member met the defendant's hiring qualifications and whether they were denied employment for lawful reasons. Here, the lower court will determine whether, for a relevant time period, class members were entitled to *Holton* awards, and whether MPC had benign or sinister motives.

In *Allison,* plaintiffs worked in separate facilities, different departments, and were victimized by various discriminatory practices. Here, it is not contradicted that putative class members resided and worked in different locales. Obviously, they had different compensable injuries (and thus claims histories). And if they were improperly denied benefits, the question of *why* is likely to be unique in each instance. To this extent, the distinction Plaintiffs/Appellees attempt to draw between these two federal civil rights cases and the case *sub judice* is a false one.

Again, MPC does not challenge, on this appeal, the lower court's class certification of primary liability issues. It is the claim of malice–MPC's alleged indifference to each plaintiff's vulnerability to harm–that is the issue. That is why the federal cases MPC has cited are persuasive.

Due Process

Seltzer v. Morton, 336 Mont. 225, 154 P.3d 561 (2007), appears to be this Court's most recent and detailed analysis of reasonableness in punitive damage awards. After *Seltzer,* and the United States Supreme Court precedent it cites–*State Farm Mutual Auto Insurance Co., v. Campbell,* 538 U.S. 408 (2003) and *BMW of North America, Inc., v. Gore,* 517 US 559 (1996)–there can be no doubt that punitive damage awards are constitutionally sensitive and subject to due process scrutiny, and the actual or potential harm suffered by "*a plaintiff*" (the one who may receive a punitive award) is an indispensable element of the reasonableness analysis. *Seltzer,* 336 Mont. at 293, 154 P.3d at 609, citing: *Campbell,* 538 U.S. at 418.

In their answer brief, Plaintiffs/Appellees argue that a district court has "numerous tools" to "deal with the assessment of punitive damages. *See,* Answer Brief, p. 19. It is suggested that a special master could be appointed, not only to calculate class members' actual damages (interest on delayed benefits), but to make medical determinations regarding maximum healing and the "predicates" of a punitive damage award.

It is easy to conceive how these suggestions, and class treatment of malice issues, could offend the due process contemplated by this Court and the United

States Supreme Court: If due process requires some nexus between a *plaintiff's* actual harm and the punitive damages allowed, and if the statutory definition of malice contemplates not only the defendant's conduct but the *plaintiff's* vulnerability to harm, the "tool" that Plaintiff/Appellees propose would never address the different circumstances between injured workers. One might have been financially desperate; another may never have needed the money.

So, too, with a "lump sum" or "multiplier approach" to awarding class-wide punitive damages. In a trial where the issue is "bad faith" claims handling, it can confidentially be predicted that the plaintiffs will present proof of "representative" individual claims where–we expect the plaintiffs would hope–the defendant's conduct was most egregious. If "cherry picked" examples furnish the basis of class-wide punitive damages, the malice connection is entirely lost, the statutory condition of vulnerability is totally ignored, and punitive damage windfalls are liberally bestowed on class members who may never have been victims of actual malice.

Exxon Shipping Company v. Baker, ____ U.S. _____, 128 S.Ct. 2605 (2008), cited at page 21 of Plaintiffs/Appellee's brief, is not availing on many levels. The case was not a class action, it considered the appropriateness of an award of punitive damages in the context of maritime law, and the punitives in

that case in fact were based on "reckless" conduct which the court expressly held was not "malicious."

Of course, as Plaintiffs/Appellees assert, courts can modify punitive damage awards to remedy some defect or legal error. Their argument regarding the "tools" of the district court, however, completely begs the due process question.

Class Definition

The Plaintiffs/Appellees *paraphrase* the lower court's class definition, then deny that it is "fail safe," or that it predetermines MPC's liability. The definition adopted by the lower court, as it relates to MPC, is:

> MPC employees with compensable worker compensation claims, with permanent impairment ratings under an edition of the American Medical Association (AMA) Guides to Evaluation of Permanent Impairment, injured between January 1, 1970 and March 28, 1998, not paid an impairment award until after December 10, 1997, and such outlined above employee falls within one or more of the following categories:
>
> (a) sustaining damages because of MPC's improper claims handling and adjusting procedures. . .

It is unmistakably a condition of class membership that one has sustained damage "because of MPC's improper claims handling and adjusting procedures." The definition obviously is, then, "fail safe" and inappropriate.

The Plaintiffs/Appellees further assert that MPC's appeal of the class definition "may be premature or moot." *See,* Answer Brief, p. 24. It is true that–as of the date this brief is written–the Plaintiffs/Appellees appear to be on the verge of reaching a financial settlement with MPC's co-Defendants, Northwestern and Putman. *MPC is not a party to those negotiations.* All MPC is able to do, in fact, is pursue a directive from this Court to the lower court that a fail safe definition is inappropriate.

Plaintiffs/Appellees assert that a class definition can be a "moving target." Answer Brief, p. 25. MPC respectfully disagrees. Almost by definition, class action litigation is complex, affecting "numerous" parties. An improperly drafted class definition initially frustrates the goal of providing proper notice to parties, and the defect infects the case to ensure that the "efficiencies" of class administration are wasted on a legally infirm result. Indeed, this may be a reason why direct appeals of class certification orders are authorized under Rule 6(3)d M. R. App. P., before a final judgment.

CONCLUSION

The lower court's certification order properly excludes fraud issues from class treatment. Malice issues deserve similar handling. As a practical matter, if fraud receives individualized consideration, the burden of doing the same for

malice is slight. As a substantive legal matter, malice does not, as Plaintiffs/Appellees contend, "focus" solely on the Defendant. The statutory definition requires a consideration of each Plaintiff's vulnerability to harm, and the Defendant's knowledge or indifference to that vulnerability. And if punitive damages are awarded, they must bear some connection to the actual damages suffered by the one receiving the award. It would offend due process to allow class members to receive punitive damages on a "representative" basis.

The lower court's class definition is undeniably and impermissibly "fail safe." This matter should be remanded with instructions that malice be considered on an individual basis, and that the class definition be re-worked so as not to require a predetermination of MPC's liability.

DATED this 8th day of March, 2010.

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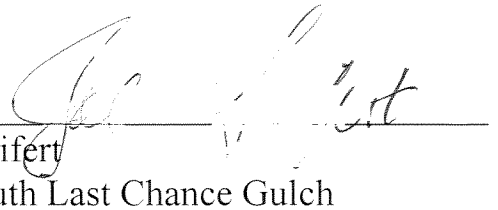

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this Reply Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated is not more than 5,000, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

DATED this 8th day of March, 2010.

Joe Seifert

CERTIFICATE OF SERVICE

I, Joe Seifert, one of the attorneys for the Defendant, Montana Power Company, above-identified, hereby certify that I served a copy of the within **DEFENDANT/APPELLANT MONTANA POWER COMPANY'S REPLY BRIEF**, by depositing the same in the United States mail, at Helena, Montana, postage fully prepaid by first class mail, directed to:

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